IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1949

No.———

CONSUMERS COOPERATIVE ASSOCIATION,
PETITIONER,

vs.

CHICAGO, ROCK ISLAND AND PACIFIC RAILROAD COMPANY, AND JOSEPH B. FLEMING AND AARON COLNON, Trustees of the Estate of the Chicago, Rock Island and Pacific Railway Company,
RESPONDENTS.

BRIEF OF RESPONDENTS ON PLAINTIFF'S PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, TENTH CIRCUIT.

Questions Presented.

The questions presented by petitioner, Petition page 6, in and of themselves disclose no reasons for the exercise of this court's discretion in granting a writ of certiorari, but on the contrary disclose that the petition for the writ should not be granted.

The questions presented amount to no more than a desire of petitioner for the Supreme Court to review the

application by the Court of Appeals of record evidence to well-established rules of local law in the State of Kansas. Essentially the questions are nothing more than a charge that the Court of Appeals erroneously adjudged that respondents' evidence was sufficient to be submitted to the jury in determining the negligence of petitioner's truck driver.

Jurisdiction and Reasons for Writ.

Petitioner's writ of certiorari asserts that the jurisdiction of the Supreme Court of the United States to review the judgment of the Court of Appeals is invoked under the provisions of 28 U. S. C. A., Section 1254, and Rule 38 of the Supreme Court.

The reason for granting the writ is stated to be that the Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions. Rule 38 5(b).

Nowhere in the petition for the writ or in the argument in support thereof does it appear that the Court of Appeals decided a question of local law in conflict with the decisions of the Kansas Supreme Court.

On the contrary, petitioner asserts, page 8, "the majority opinion correctly states the applicable controlling law of Kansas." The dissenting opinion, a part of which is quoted by petitioner, does not point out wherein such claimed conflict appears nor that in fact there is such conflict. The dissenting opinion is based upon the disagreement with the other members of the court in the

appraisal of respondents' evidence; and the dissenting opinion so states, viz.:

> "The only question on this appeal is whether the Rock Island introduced probative evidence, direct or circumstantial, of sufficient weight, which, if believed by the jury, would overthrow the prima facie case of the exercise of due care by the driver of the truck." (180 F. 2d 907)

There was and is not a disagreement in deciding a question of local law in a way probably in conflict with applicable local decisions. All members of the court appear to be in agreement as to the law of Kansas applicable to the issues in the case; it was only in the appraisal of the evidence to determine its sufficiency for consideration by the jury that the dissenting judge entertained a different view than the other members of the court.

The dissenting opinion does not consider all of respondents' evidence and the reasonable inferences to be drawn therefrom. Thus, the dissenting opinion states, 180 F. 2d 906:

> "All the evidence we have is that the terrain was level; that the train was running approximately 65 miles per hour; that the head light was burning and could be seen a great distance down the track; and that a crossing accident occurred. It is from these facts and from these facts *alone* that we must find negligence on the part of the driver of the truck to enable the railroad company to recover." (Emphasis supplied.)

The limited facts so considered by the dissenting judge, and the consideration of which only he attributes

to the other members of the court, omit many proved important and material indisputable facts. In addition to the "ground was level", "the headlight burning, which could be seen at a great distance", and "the train was traveling at a speed of approximately 65 miles per hour", which the dissenting opinion states to be the evidence, other facts were established directly bearing upon the negligence of the driver of the transport truck, viz.:

1. The driver of the motor transport was familiar with the highway and the crossing. (R. 27)

2. The crossing was level for 50 feet north of the crossing. (R. 55)

3. There was no fog, visibility was good, and there was no snow or ice on the highway. (R. 66, 91)

4. At any point within 240 feet north from the track, the truck driver had an unobstructed view and could see the train directly when it was more than 2,000 feet from the highway crossing and could see the light of the train as far as nearly 5 miles away. (R. 56; Exhibits 1, 2, 3, 5 and 7)

5. The crossing was planked solidly between and on the outside of the rails and was surfaced with the same material as the highway. (R. 54, 90)

6. The rails were the same height as the planks, making a smooth crossing. (R. 90)

7. There were no flares or other signals near the crossing (R. 90), which the law requires such vehicles to carry and drivers to place on the highway in the event

the vehicle becomes stalled. (G. S. of Kansas, 1947 Supp., 8-5,108)

8. The truck driver was in or about the truck when it was struck and he was killed, indicating the driver had not stalled the truck on the track (the same presumption arising from love of life upon which petitioner relies would have prompted the truck driver to leave the truck and protect himself if the truck had stalled on the track before the collision.) Smith v. Bassett, Petition page 15.

9. The engineer operating the train was a careful, alert, competent and observant engineer, always complying with the rules. (R. 65, 67, 82)

10. The engineer and fireman both appeared normal physically and were mentally alert when starting their run a short time before. (R. 67, 72, 73)

11. The engineer handled the train through the curves and stopped at the stations in a normal way prior to the collision, indicating he was alert and observant. (R. 67, 73)

12. The regular crossing whistle was sounded for the crossing where the accident occurred, and the whistle signal post for this crossing was one-fourth mile east of the crossing (R. 57; Exhibit 1), indicating that the engineer was observant of the track ahead, and proper warning signals given.

13. The engineer could see a truck at the crossing when the train was 1600 to 1800 feet from the crossing (R. 83), yet the brakes of the train were not applied at that time, indicating there was no truck on or dan-

gerously near the crossing when the train was at that point.

14. The speed of the train at the time was 60 to 65 miles per hour. (R. 66, 71)

15. The engineer applied the brakes of the train in emergency three to five seconds before the collision, which at 65 miles per hour would be 285 to 475 feet from the crossing (R. 62, 70, 75, 79); indicating that although keeping a lookout ahead, the first time the engineer realized the truck was not stopping or was entering upon the track was when the engine was 285 to 475 feet from the crossing.

16. After the collision the throttle of the engine was found in an idle position and the automatic brake valve was in full emergency position (R. 93).

17. Admissions of appellee that the truck "proceeded southerly to cross said tracks. That at *said* time" the train collided with the truck (R. 20, 21; *Rogers v. Burden & Co.,* 137 F. 2d 284; CCA 10; *Berry v. Dewey,* 102 Kan. 392, 170 Pac. 1000); indicating that the truck was not helplessly stalled on the track, *but was moving across the track.*

These and other *proven facts and circumstances* to to be gleaned from the record (including a stenographic transcript of evidence in excess of 250 pages, plus numerous depositions and exhibits) appear not to have been considered in the dissenting opinion, 180 F. 2d 907.

The dissenting opinion, Petition page 9, which petitioner asserts supports the reason for granting the writ, states:

> "The legal presumption that the deceased driver exercised due care implies that he looked, saw the approaching train, and had sufficient time to cross otherwise there could be no presumption that he exercised due care in attempting to cross the tracks."

This statement we believe misconceives the law of Kansas; for, the statement makes the legal presumption arising from the instinct of self-preservation, a conclusive presumption; instead of a rebuttable presumption which the Kansas Supreme Court has declared to be the law of Kansas. The statement means that because of the instinct of self-preservation, the truck driver "looked, saw the approaching train, and had sufficient time to cross" the track. If this be true and if the law was obeyed by the driver, then there was no collision. If there was a collision, then the statement is incorrect. The fact of the collision is not in controversy; there was a collision.

The conditions under which writs of certiorari may be granted by the Supreme Court of the United States are summed up by The Honorable Fred M. Vinson, Chief Justice of the United States, 69 S. Ct. V. Writs of certiorari are granted only when at least four Justices feel that the "*public importance* of the question presented requires its consideration by the Supreme Court." (Emphasis supplied.) The Chief Justice continues:

> "The function of the Supreme Court is, therefore, to resolve conflicts of opinion on federal questions that have arisen among lower courts, to pass upon questions of *wide import* under the Constitu-

> tion, laws, and treaties of the United States, and to exercise supervisory power over lower federal courts. *** To remain effective, the Supreme Court must continue to decide only those cases which present questions, whose resolution will have immediate importance *far beyond the particular facts and parties involved.*" (Emphasis supplied.)

The Chief Justice then points out that a petition for certiorari should explain why it is vital that the question involved be decided finally by the Supreme Court, and that if it only is for the purpose of showing that the decision below might be erroneous, the petition has not fulfilled its purpose.

The petitioner herein has failed to meet the conditions outlined. Nowhere does the petition point out conflicts of opinion on federal questions that have arisen among lower courts; nor for that matter, that the question involved is of immediate public importance beyond the particular facts and parties involved. The petition is insufficiently predicated simply on the complaint of a losing litigant that the lower court's decision is erroneous. That such complaint of petitioner is without foundation is demonstrated by the following reply to petitioner's argument:

Argument.

Petitioner's argument, Points I, II and III, is in essence but one complaint, viz., the petitioner is dissatisfied with the conclusion of the Court of Appeals that an analysis of the evidence, including the reasonable inferences to be drawn therefrom, compels the con-

clusion that such evidence was sufficient to require submission to the jury for its determination of ultimate finding of whether or not petitioner's truck driver was guilty of negligence proximately causing the collision. Petitioner's argument does not point out or demonstrate that the Court of Appeals did not consider and apply the local law of Kansas.

The decision of the Court of Appeals, after agreeing with petitioner's complaint that negligence on the part of the truck driver could not be based upon speculation, conjecture, or presumption, states: "But plaintiff's case was not cast in that mold. It was of a different pattern." The court was of the opinion that the evidence did tend to establish probative facts and circumstances from which the jury, in the exercise of fair and impartial judgment, could reasonably draw the deduction that the driver of the transport was negligent in one or more of the particulars alleged in plaintiff's complaint. (180 F. 2d 900, 905)

The cases cited by petitioner were recognized and treated in the opinion and decision of the Court of Appeals. So were many other decisions of the Kansas Supreme Court relating to the question involved.

Again adverting to REASON FOR GRANTING THE WRIT (Petition for Writ, page 8), petitioner states and concedes that "the majority opinion correctly states the applicable controlling law of Kansas"; and the cases cited by petitioner in its argument, when read and analyzed, which was done by the Court of Appeals, do not vitiate petitioner's statement and concession that the

Court of Appeals has correctly stated the applicable controlling law of Kansas. For instance:

Petitioner's argument emphasizes and relies upon *Smith v. Bassett,* 159 Kan. 128, 134, 152 P. 2d 749; *Miller v. Gabbert,* 154 Kan. 260, 266, 118 P. 2d. 523; and *Lukens v. Kellogg,* 127 Kan. 568, 274 Pac. 225. The first of these, *Smith v. Bassett,* involved the death of a pedestrian laborer who was killed by a backing truck on private property along a narrow passageway, without the truck driver's employer having anyone stationed at the rear of the truck to warn the truck driver of persons who might be using the passageway. In the quotation cited by petitioner, Petition page 15, it will be noted the court carefully points out that there was a lack of evidence to overcome the presumption indulged in behalf of the deceased, *as a matter of law.* The opinion further states:

> "All of the evidence, when considered in the light most favorable to appellee, presented a situation where reasonable minds might differ as to whether decedent exercised reasonable care for his own protection. *Under such circumstances it was the province of the jury* to determine the question of decedent's contributory negligence (Meneley v. Montgomery, 145 Kan. 109, 112, 64 P. 2d 550, and cases therein cited) and the court so instructed the jury." (Emphasis supplied.)

This is consonant with the decision of the Court of Appeals in the present case.

Miller v. Gabbert, Petition page 18, was an action for damages resulting from a fire. The court points out

the general rule that negligence may not be based upon mere surmise, speculation and conjecture and then states:

> "There is no proof the gasoline would ignite spontaneously and there is no contention that it did. There was *no proof* whatever by plaintiff as to what caused the fire, much less any that it was any intervening act of the defendant." (154 Kan. 266) (Emphasis supplied.)

Lukens v. Kellogg cited by petitioner was an action based upon the theft of wheat, where again the Kansas Court applied the rule that liability cannot be based on *bare* guess, speculation or conjecture; and the syllabus by the court points out that there was "a *total want* of evidence of material facts requisite to establish a cause of action", which *total want* could not be supplied by surmise or conjecture.

On the other hand, the Kansas Supreme Court has decided cases in which the quantum and quality of circumstantial evidence was involved:

In *Railway Co. v. Wood,* 66 Kan. 613, 72 Pac. 215, the court said:

> "Circumstantial evidence in a civil case, in order to be sufficient to sustain the verdict of a jury, need not rise to that degree of certainty which will exclude any and every other reasonable hypothesis. The jury are not infrequently called on to decide between two or more theories, and in doing so may exercise their own best judgment in accordance with their oath-bound consciences. This must necessarily be so, for it is the province of the jury and not of the judge to determine whether the evidence better supports this or that theory."

Also,

"It is true, as announced in *Railway Co. v. Rhoades, supra,* that presumptions may not be based upon presumptions, and that it will not do to consider chance or circumstantial evidence having but a questionable or circumstantial basis of fact, *but this is very far from announcing that an undisputed fact may not be used as a basis from which to draw a reasonable conclusion,* even though some other and opposite conclusion equally reasonable might also be drawn; *otherwise we might have a condition where a question of fact could not be settled,* because the circumstances upon which its settlement depended might point to two or more equally reasonable conclusions. *As between two or more reasonable deductions from circumstantial evidence,* the court *is not at* liberty to direct which one *the jury shall adopt.*" (Emphasis supplied.)

Also, in *Supica et al. v. Armour & Company,* 131 Kan. 756, 758, 293 Pac. 483, the court said:

"Under our decisions it is not necessary in a civil action like this one that circumstantial evidence should rise to that degree of certainty which will exclude every other reasonable conclusion. (*Railway Co. v. Wood,* 66 Kan. 613, 72 Pac. 215; *Railway Co. v. Colliati,* 75 Kan. 56, 88 Pac. 534; *Hashman v. Gas Co.,* 83 Kan. 328, 111 Pac. 468; *Broseghini v. Coal Co.,* 92 Kan. 113, 139 Pac. 1025; *Watkins v. Harper County,* 95 Kan. 166, 137 Pac. 822; *Mayeur v. Mining Co.,* 106 Kan. 123, 186 Pac. 1035; *Lane v. Insurance Co.,* 113 Kan. 365, 214 Pac. 92)."

In *Rierson v. Southern Kansas Stage Lines Co.,* 146 Kan. 30, 69 P. 2d 1, in closing its opinion the court said:

"Without recounting in detail the testimony of the various witnesses, we think there was ample evidence to justify the findings of fact and the ver-

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should have seen (*McDonald v. Yoder*, 80 Kan 25, 101 Pac. 468; *Lilly v. Wichita Railroad & Light Co.*, 127 Kan. 527, 530, 274 Pac. 205)." (Emphasis supplied.)

Directly in point as declaratory of the laws of Kansas, and supporting the conclusion of the Court of Appeals, is the declaration of the Kansas Supreme Court in *Ogden v. Wilson*, 120 Kan. 269, 243 Pac. 284, wherein the court, in distinguishing between the rule applicable in street railway cases and steam railroad cases, said:

> "In the case of the railroad, the traveler is never regarded as exercising reasonable caution if he loses in a race with the train to the crossing. He is required to yield it the right of way and not undertake to cross until it has passed."

And, in *Rathbone v. Railway Co.*, 113 Kan. 257, 214 Pac. 109, an action by a husband for his wife's death in a railroad crossing collision, the court said:

> "It is settled law in this state that it is negligence to attempt to cross a railroad track ahead of a speeding train, even in a case where but for a defective crossing the party making such foolhardy attempt would have escaped unscathed, by a few ticks of the clock (Bunten v. Railway Co., 100 Kan. 165, 163 Pac. 801)";

and, again in *Pagan v. Lowden*, 145 Kan. 513, 66 P. 2d 567, an action to recover for the death of plaintiff's decedent, killed at a grade crossing by collision with a train, the court said:

> "Had deceased glanced down the track in the direction from which the train was coming when he was 25 feet away from the track he would undoubt-

> edlly have seen the train coming. The fact that his front wheels had barely come to a stop on the first rail when his car was struck shows that he must not have been looking just before he drove onto the track. Had he looked he surely would have seen the train coming in that short a time, even though it was going 60 miles an hour. *What must have happened is that he drove ahead and onto the tracks without keeping the lookout that an ordinarily prudent man should have kept under the circumstances.*" (Emphasis supplied);

and, in *Holman v. Railway Co.*, 113 Kan. 710, 215 Pac. 1111, a train-automobile collision case, the court said:

> "Under rules of logic frequently applied by this court, it is often held in crossing-accident cases that testimony and findings that a person had looked before crossing a railroad track and saw no train approaching *must be disregarded* because manifestly untrue since if the person looked, he must have seen whatever was within reasonable range of vision to be seen." (Emphasis supplied.)

Further, in *Gilbert v. Railways Co.*, 109 Kan. 107, 197 Pac. 872, a streetcar-automobile collision case, the court points out that the presumption arising from the natural love of life and instinct of self-preservation does not amount to proof:

> "It is nothing more than a presumption, the force of which is destroyed at once by proof to the effect that the person injured or killed did not exercise due care. In this case, the presumption, *if it could be said to have existed at all*, is destroyed by the finding of the jury to the effect that if Morris had exercised due care—had looked—he would have seen the approaching car in time to have stepped from

the running board and to have saved himself from injury." (Emphasis supplied.)

And, in *Gaffney v. Railway Co.*, 107 Kan. 486, 192 Pac. 736, where plaintiff's decedent was struck by a train, the court said:

> "It must be presumed that one having the capacity to see must have seen that which was within the range of his vision. (Young v. Railway Co., 57 Kan. 144, 45 Pac. 583.) Under such circumstances, one who can see and learn of the danger if he looks, is held to have knowledge of the danger even if he does not look."

And finally, in view of petitioner's insistent reliance upon the lack of an eye witness to the collision in question, the Kansas Supreme Court in *Sawhill v. Casualty Reciprocal Exchange*, 152 Kan. 735, 107 P. 2d 770, said:

> "It also is true that when plaintiff rested his case no one had testified who had been an eye-witness to the collision. *But the testimony of eye-witnesses is not always essential. Evidence of physical facts and circumstances may be sufficient.* Here there was substantial, competent evidence that the collision occurred in the northeast quarter of the intersection, a place where plaintiff, driving north, had a right to be, and where the defendant Hubert, driving east, should not have been." (Emphasis supplied.)

Like the defendant in the Sawhill case, petitioner's truck driver in this case had no right to be upon the railroad track when respondents' train was immediately approaching.

The foregoing are but a few of the cases stating the well-established law of Kansas relating to railroad crossing collisions, which fully justifies the statement of the Court of Appeals in its opinion in the present case, as follows:

> "And in order for the issue to be one for the jury under appropriate instructions of the court, it was not essential that the evidence be of such character as to establish a basis for the jury to determine with the definiteness of mathematical certainty between these reasonable inferences, as in either event the driver of the transport was negligent and his negligence was the cause of the accident."

Conclusion.

Where conclusions of Courts of Appeals depend on appreciation of circumstances which admit of different interpretations, the Supreme Court will not interfere. *Federal Trade Commission v. American Tobacco Co.,* 274 U. S. 543, 47 S. Ct. 663, 71 L. Ed. 1193. The jurisdiction conferred on the Supreme Court to review decrees of the Courts of Appeals on certiorari was not conferred merely to give the defeated party another hearing, but to secure uniformity of decision and to bring up cases of importance, which it is in the public interest to have decided by the court of last resort. *Magnum Import Co. v. Coty,* 262 U. S. 159, 43 S. Ct. 531, 67 L. Ed. 922. The Supreme Court does not grant certiorari to a Court of Appeals to review evidence and to discuss specific facts. *U. S. v. Johnston,* 268 U. S. 220, 45 S. Ct. 496, 69 L. Ed. 925.

Because petitioner has failed to demonstrate a question of "public importance" requiring consideration by the Supreme Court; because the opinion of the Court of Appeals presents no conflict of opinion on federal questions requiring resolution by the Supreme Court; because there is presented no question whose resolution will have "immediate importance far beyond the particular facts and parties involved"; because the decision of the Court of Appeals does not conflict with decisions of the Kansas Supreme Court but is in accord therewith; and because there is no explanation why it is vital that the question involved be decided finally by the Supreme Court of the United States, but only the expressed dissatisfaction of petitioner with the decision of the Court of Appeals as to the quality of respondents' evidence, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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